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United States
Circuit Court of Appeals
FOR THE NINTH CIRCUIT

RUSSELL G. BELDEN and
A. EUGENE WAYLAND,
Plaintiffs in Error,

vs.

THE UNITED STATES OF
AMERICA,
Defendant in Error.

Upon Writ of Error to the United States District Court for the Eastern District of Washington, Northern Division.

BRIEF OF PLAINTIFF IN ERROR, RUSSELL G. BELDEN.

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STATEMENT OF THE CASE.

Russell G. Belden and A. Eugene Wayland were both found guilty by the jury and sentenced. Since obtaining the Writ of Error A. Eugene Wayland arranged with the District Attorney to begin the service of his sentence and to waive his appeal. This brief is in behalf of the Plaintiff in Error Belden.

An indictment with three counts was returned against both Belden and Wayland. The first count charged them with having, prior to the 18th day of January, 1911, devised and intending to devise a scheme and artifice to defraud one John Neiderer and divers persons, being all such persons from whom they would, or might, obtain money or property by means of said scheme and artifice and divers false and fraudulent schemes, representations and promises, and persons with whom said defendants might, or could get into communication through the United States mails, which scheme and artifice to defraud was to be effected by the use and misuse of the United States Post Office Establishment, intending to incite and induce such persons so intended to be defrauded by means of printed circulars, letters and reports distributed through the mail. The indictment further charged them with having organized the International Development Company, which was controlled and managed by defendants, which was to be the fiscal agent of other companies thereafter to be organized and controlled by defendants. That through the International Development Company the defendants procured certain alleged coal claims in British Columbia, having little or no value, and organized a corporation named Michel Coal Mines, Limited, with a capital stock of 1,500,000 shares, par value $1.00 each, and in consideration for defendants conveying to the corporation the coal claims, the corporation would

issue to them as paid up a large majority of the captal stock; and also caused the formaton of two other corporations following the same general scheme, named respectively, Crown Coal & Coke and Empire Coal & Coke. Further, that they caused to be incorporated a company known as Crows Nest & Northern Railway Company for the purpose of taking over a charter they obtained from the Canadian Government, for a large percentage of the capital stock fully paid up, the balance of the stock not issued in their name, or in the name of the International Development Company was designated as treasury stock. It was further charged defendants would, by stock manipulation, and other means, control all of the corporations. It was further charged that defendants, in various ways, sold the stock of the various companies, representing it was of great value, when as a matter of fact the only corporation which had valuable coal claims was the Crown and they sweetened other sales with Crown stock, and sold Railroad stock representing that the money was to be used in constructing a railway, when it had not acquired any right-of-way. Further that with every $500.00 purchase of stock in the Empire one share of railway stock was given purchasers with the understanding $100.00 was to be used to equip the railroad, and the defendants used the money for their own benefit; that it was represented by the defendants that the stock they were selling or offering for sale, was

treasury stock to be used for development of the mining properties when in fact they were selling their own personal stock. That for the purpose of executing said scheme they sent the letter to John Neiderer set out in first count (p. 13).

Second count is like unto the first only the letter was addressed to Walter J. Woods.

Upon the third count the Court directed a verdict of not guilty.

The defendants severally demurred to the indictments and to each count thereof, assigning, among other grounds, that it did not state any crime against either of the defendants, all of which were overruled.

The defendants thereupon each moved the Court for separate trials supported by their affidavits.

The trial resulted as aforesaid. The defendants each filed their motions for a new trial and in arrest of judgment, both of which were overruled by the court and Plaintiff in Error sentenced to serve a year and a day at McNeil's Island.

THE EVIDENCE.

Belden and Wayland were young men at the time they first engaged in the real estate business in the City of Spokane under the name of the

R. G. Belden Company. It was first a partnership and was later incorporated. About a year afterwards the International Development Company was organized and the first promotion attempted was an irrigation enterprise (p. 263 and subsequent). Prior to the organization of this company defendants had an option on what was known as the McGuire claims. An investigation induced defendants to drop them and to become interested in the Crows Nest coal fields, which are now the most extensive in the Northwest.

The Michel was the first corporation organized. Its articles were executed in November, 1905 (p 360). It started with two coal claims. Mr. Gamble, a coal expert, investigated the ground and pronounced it good coal land or ground.

The next corporation organized was the Crown Coal & Coke Company (Plaintiff's Ex. 89, p. 384). The articles were executed August 25, 1906, nearly a year after the Michel. It started with ten coal claims (Plaintiff's Exhibit 103· p 385).

The next company organized was the Empire Coal & Coke Company (Plaintiff's Exhibit 141, p. 401), seven trustees, and Wayland was not on the board. It started with 1240 acres of coal land.

These coal claims were situated in a country where transportation was an important item and for that purpose the Crows Nest & Northern Railroad Company was organized (Plaintiff's Exhibit

102, p. 385) with five trustees. It is admitted by the Government that the Crown Company's property has valuable coal deposits (p. 143, testimony witness Thomas). He testified he examined the Michel and Empire and found them barren, but made no report to either Belden or Wayland, but did to their engineer Mr. Hower (p. 143).

Mr. Gamble, the engineer who experted the properties for the defendants, testified (p. 290 et. seg.) that he had advised the defendants the same veins of coal existed on the Michel that were found under the McInnis property. He also advised the defendants to acquire the Empire property (p. 292).

The business of their corporations was carried on practically the same as all other corporations organized for the purpose of developing the natural resources of the country. The only assets were the coal prospects or ground. Each corporation had from three to seven directors, and some even more. They were largely capitalized it is true, but in this they were not unlike other development corporations. There is not one line of testimony in the entire record that defendants did not always believe that their claims contained immense bodies of coal. There is not a line of testimony to the effect that they manipulated the shares in such a way as to give them the control. It is true they usually had the larger number of shares, but that is because they had the coal locations to sell to the various corporations. They never in any way schemed to get hold

of the coal locations, but acquired them in the usual way' neither did they do any of the things charged in the indictments. It is charged they sold personal stock, representing it as treasury. In nearly every instance where this claim is made they were able to disprove the charge with written receipts. There is some testimony relative to misrepresentations, etc., but it is denied, and a great many cases clearly disproved. Here were four different corporations in which were interested a great many different people and as they lost what they invested it is not to be wondered at that a great many got sore, for as a general thing the public is a hard loser.

ASSIGNMENT I.

The court erred in overruling the demurrer of defendant Belden to each of the counts in the indictment (p. 43).

ASSIGNMENT II.

The court erred in denying the defendant Belden's motion for a separate trial (p. 55).

ASSIGNMENT III.

The court erred in admitting in evidence Plaintiff's Exhibit 7 (p. 358).

ASSIGNMENT IV.

The court erred in admitting in evidence Plaintiff's Exhibits 8 and 9.

ASSIGNMENT V.

The court erred in overruling defendant's objection to the evidence of witness House and in permitting him to testify as to the number of Railway Trust stock sold and amount realized therefrom (p. 165).

ASSIGNMENT VI.

The court erred in permitting the witness House to testify as to the number of shares of treasury stock each of the various corporations that was sold by defendants, or International Development Company and the amount realized therefor, and the amount of personal stock in said companies held by said defendants, and the amount realized from the sale thereof. (See this numbered Assignment in the argument.)

ASSIGNMENT VII.

The court erred in admitting in evidence, over defendants' objection letter set out in second count of indictment (Plaintiff's Exhibit 185, p 218).

ASSIGNMENT VIII.

The court erred throughout the trial in permitting the Government to introduce in evidence alleged acts and declarations of the defendant Wayland, which occurred in the absence of the defendant Belden. (See argument this Assignment.)

ASSIGNMENT IX.)

The court erred in overruling motion of defendants and each of them made at the close of all of the evidence to dismiss the charge against each of them for the reason the evidence was insufficient to sustain a conviction against either of them (p. 833).

ASSIGNMENT X.

The court erred in instructing the jury upon the subject of a scheme, design, or artifice for the reason there was not any evidence that the defendants had entered into any scheme design, or artifice to defraud any person as set out in the various counts in the indictment, or at all.

ASSIGNMENT XI.

The court erred in giving to the jury instructions upon the question of conspiracy (p. 339-40-41) for the reason that the indictment did not charge the defendants, or either of them, with having entered into any conspiracy for the purpose of defrauding any person or persons and for the further reason that there was not any evidence introduced for the purpose of establishing any conspiracy and for the further reason no conspiracy was established.

ASSIGNMENT XII.

The court erred in giving to the jury the instruction upon conspiracy, pages 339-40-41, and the whole of said charge or instruction.

ASSIGNMENT XIII.

The court erred in refusing to give to the jury instructions requested by the defendants, Nos. 1, 2, 3, 4, 5 and 6, and each and every one thereof, found on pages 344 and 345.

ASSIGNMENT XIV.

The court erred in refusing to give to the jury defendants' request No. 10 and the whole thereof found on page 346, which would have told the jury that whether commercial deposits of coal are on the Empire and Michel depends upon the opinion of experts, and that defendants could not be convicted upon the opinion of any expert witness as to the nonexistence of coal.

ASSIGNMENT XV.

The court erred in refused to give to the jury requested instruction No. 11 on page 346.

ASSIGNMENT XVI.

The court erred in refusing to give to the jury instructions Nos. 13 and 15, on pages 347 and 348.

ASSIGNMENT XVII.

The court erred in refusing to give to the jury requested instruction No. 17, found on page 348, which would have told the jury that the letters set out in the first count of the indictment referred only to the sale of treasury stock, and that defendants could not be convicted upon said count for

selling personal stock under the representation that it was treasury stock.

ASSIGNMENT XVIII.

The court erred in refusing to give to the jury requested instructions Nos. 18 and 19, found on pages 348 and 349, and each and all thereof.

ASSIGNMENT XIX.

The court erred in refusing to give to the jury requested instructions Nos. 20 and 23, found on pages 349 and 350.

ASSIGNMENT XX.

The court erred in overruling the motion of the defendant Belden for a new trial.

ASSIGNMENT XXI.

The court erred in overruling the motion of defendant Belden in arrest of judgment.

ASSIGNMENT XXII.

The court erred in entering judgment upon the verdict of the jury and in sentencing defendant Belden.

ASSIGNMENTS I. AND XXI.

These two assignments relate to the sufficiency of the indictment and will be considered together.

The scheme as laid in the indictment renders a criminal intent impossible. Section 215 of the Criminal Code provides that "Whoever having de-

vised or intending to devise any scheme or artifice to defraud * * * * * * shall for the purpose of executing said scheme, or artifice, or attempting so to do," etc.

The first count in the indictment, as does also the 2nd and 3rd, opens with this language:

"That Russell G. Belden, etc.' on the 18th day of January, A. D. 1911, * * * having theretofore devised and intending to devise a scheme to defraud one John Neiderer, and divers other persons to the grand jury unknown, * * *."

It will be thus seen an attempt is made to jointly charge two defendants in the same indictment without alleging or attempting to charge a conspiracy. It would require all the pleader has alleged to state a crime against one defendant, admitting the other facts set out in the indictment were sufficient.

Two defendants, as the court said in the instructions, could be responsible for the acts of each other only in of two ways. Either that they had formed a conspiracy, or where one aided or abetted the other. Now there is no attempt to charge a conspiracy or confederation. The indictment simply says, "having theretofore devised, or intending to devise," then goes on and sets out the organization and manipulation of the various corporations. One man did not do this alone. Two are charged. The language is "theretofore and intending." This language involves both a recitation and some future act. If a conspiracy had been entered into, they

could not have intended. There is not any charge in the indictment that any of the overt acts set out in the indictment were the result of any conspiracy or that one aided or abetted the other, if such a thing were possible. The importance of this contention at once appears when in the first count of the indictment we find a letter signed by the defendant Belden without any claim that his co-defendant, in any wise, participated in this overt act, and then we turn to the second count and discover that the overt act in that count was the work of Wayland, without any allegation of Belden's connection with it. In each case the letters are the letters of the corporation, signed by the officers who, in these two counts, were the defndants respectively. There is no charge against the corporation or that these letters were the act of the corporation.

The recitation as to how the scheme or devise was effected is merely a recitation of a lot of facts or circumstances without any allegation that they were the result of a conspiracy between the defendants or defendants and other persons. There is no positive allegation anywhere that any of the acts detailed were a part of any scheme, or the result of any conspiracy. Neither is there any allegation that any of said acts occurred in this judicial district, or within the statute of limitations. While the courts are liberal in holding almost any sort of a grand jury report to be an indictment, we cannot see on what theory this document can be so dignified.

The pleader has seen fit to allege that these letters set out in the first and second counts were for the purpose of executing said scheme and artifice and in attempting so to do, when each is perfectly harmless in and of themselves, or in connection with the scheme there alleged.

ASSIGNMENT II.

This refers to the refusal of the court to grant the defendants a separate trial.

In passing on this motion page 70, the court said:

"If it were true that the testimony offered against one of these defendants which is not competent or material against the other, there would be strong support for your motion * * *. But the Government is evidently proceeding upon the theory that each of these co-defendants aided and abetted the other, or that there was a conspiracy between them. On that view of the case any testimony competent against one would be competent against the other. * * *"

The court even was at a loss to know what the theory of the Government was. The indictment did not charge a conspiracy, or the aiding or abetting one or the other. As a consequence they were tried jointly upon an indictment which did not state a crime against either, at least not a conspiracy. That being so, everything Wayland had done within the statute of limitations, or without, in his whole business career was lugged in against Belden, and vice versa. The first evidence introduced was the

minute book of the Michel Company at page 10, "Exhibit 2," which was an offer to sell the coal claims to the company. A document to which Wayland was not a party. Also "Plaintiff's Exhibit 4," Articles of Incorporation of the said company. "Exhibit 7" the same. Also 11 and 12. The same thing was true throughout the entire trial. Letter after letter was introduced written by Belden and there was not any admonition by the court to the jury to disregard the evidence and no explanation or caution given. Then again, the letter set out in the first count of the indictment was written by Belden and Wayland's connection with it not shown. As to the second, it was written by Wayland and Belden never heard of it. Here were two men in business for ten years together. They are both tried together and the entire career of one is thrown into the scales against the other without any attempt to show his responsibility therefor.

If one or the other wrote a damaging letter, or made a damaging admission, the introduction against the other would certainly be prejudicial.

Let us cite two instances: Take the evidence of Mrs. Harrington (p. 250), and Mrs. Inman (p. 252), throw that into the balance against one of the defendants, and while not admissible for any purpose, yet it was admitted against both defendants. Two defendants should not be tried together where it is evidence the testimony will cover a period of several years and acts independent in their nature

will be admitted. It cannot be said that defendants convicted in that way had a fair trial.

When a conspiracy is charged and proof is being admitted the court should caution the jury that the evidence against one will not be proof against the other until the conspiracy is established, and if it is not established, instructed to disregard the evidence. This was not done in this case although no charge of conspiracy made and likewise no proof.

Steers vs. U. S., 192 Fed. 1.

The overt act must be one independent of the conspiracy or agreement. It must not be one of a series of acts constituting the agreement or conspiring together, but it must be a subsequent, independent act following the complete agreement or conspiracy, and done to carry into effect the object of the original combination.

U. S. vs. Richard, 149 Fed. 443-6.

ASSIGNMENT III.

This assignment refers to the Inland Surety Company partnership agreement. This was objectionable for the reason discussed under the assignment relative to separate trials. By the terms of the agreement written on the face it was terminated and Wayland was never a party. The termination was long prior to the incorporation of the Crown, Empire and Crows Nest Railway Company. It could

not therefore have been a part of any scheme or at least, the one set out in the indictment.

ASSIGNMENT IV.

Plaintiff's "Exhibit 8" (p. 77) was a meeting at which defendant Wayland was not present and No. 9 was an agreement to which neither defendant was party.

ASSIGNMENT VI.

This evidence did not relate to any issue raised by the indictment. The only charge in the indictment in connection with railroad stock was in representing that the money for which it was sold went to building the road when it did not. Here is stock sold for notes and a witness permitted to compute not only the amount of sales but the commission which the defendants received, without any of the circumstances or showing the unreasonableness of the charge.

ASSIGNMENT VII.

This has reference to the letter set out in the second count of the indictment. Mr. Belden's connection with it is not shown, neither is there any proof it was written or mailed by any of the defendants. If ever an innocent communication was penned this is one. It has no relation to any charge in the indictment. It could not even remotely refer to it. There is no allegation and no proof that it was intended that it should receive other than the

ordinary construction. That being so the count could not state an offense and this letter, unless it had some veiled meaning, should not have been admitted, especially against Belden.

ASSIGNMENT VIII.

"Plaintiff's Exhibit 69" was a letter written by Wayland (p. 374). "Plaintiff's Exhibit 70" is the same. "Plaintiff's Exhibit 243" (p. 419) was a circular sent out by Wayland. Also "Exhibit 244." All through the trial witnesses were permitted to testify as to what Wayland told them; what representations he made, and everything of that character. This evidence was not admissible for there was no conspiracy alleged, or established by the evidence. Covering a period of that length, having to account for their own conduct was enough, without having to answer for the omissions of a co-defendant.

ASSIGNMENT IX.

At the close of all the evidence defendants each moved the court for a directed verdict of not guilty. This assignment involves all of the evidence in the case and challenges the case made out by the Government. While it is true the Government may have introduced some evidence that the defendants made misrepresentations in rgard to some matters set out in the complaint, these conversations and letters could not have related back to the organizing of these corporations. For instance, if defendant

told some one that he was selling treasury stock when it was his own personal stock, how could that be considered as reverting back and showing that at the time the corporation was organized that it was intended at a future time to make such a representation. There is no proof that at the time one set of claims was secured which were deeded to a corporation that it was intended as a part of a scheme that another should thereafter be organized. Nor is proof defendants received more stock for their locations than some other stockholders any proof. We doubt if any like group of corporations was ever conducted as apparently honest, at least as these. The situations were met as they arose. If a new group of locations was secured a corporation was organized to take them over. Instead of the fact being that the defendants knew the claims were worthless it is in evidence the Crown was valuable and Mr. Gamble the engineer whose qualifications are not questions says the same veins exist under the Empire and Michel. It is true Thomas, the Government engineer, testified the veins existed only on the Crown, yet his opinion ran counter only to Gamble and defendants and other stockholders who saw the property. The record bristles with evidence that every one was urged to go to the properties and inspect before purchasing. How can it be said in the face of these facts that this was a scheme to defraud? Are the defendants to be convicted for an error in judgment? Are they criminals because

they thought stratas of coal underlaid the Michel and Empire when it has never been demonstrated coal was not there? The history of most mining operations has been that mistakes have been made in trying to tell what was underground. Great engineers have differed as they do in this case and a layman who relies on their superior knowledge does not thereby become a criminal. The charge that personal stock was sold which was represented as treasury we have heretofore shown was unfounded. If it was the stock of a claim or corporation possessed of lands with good stratas of coal it would make no difference for it would not be an attempt to defraud. The purchaser would be getting something of value. We take it this court is not concerned with the amount of profit or extent to which a purchaser was defrauded. If you will turn to page 427 there will be found the list of officers at various times of the corporations involved. It will be seen they had four to ten directors and the entire record taken together shows that instead of the representations of defendants being false they were true and the probabilities are these are all good coal lands, and that defendants should not be selected from the large number of parties connected with the operations.

For a matter of opinion a man cannot be held responsible, criminally, or civilly.

XII Am. & Eng. Enc. of Law, p. 813.
Durland vs. U. S., 161 U. S. 306.

"A representation may be so obviously without foundation as to afford cogent evidence of a criminal intent in him who makes it but nevertheless if in fact it proceeds from honest ignorance or delusion it does not help to make a scheme to defraud within the Statute."

Rudd vs. U. S., 173 Fed. 912.

"Where all the substantial evidence is as consistent with innocence as with guilt it is the duty of the appellate court to reverse a judgment of conviction."

Harrison vs. U. S., 200 Fed. 662."

"* * * the scheme cannot be found in any mere expression of honest opinion as to quality or as to future performance."

Id.

"The ultimate issue of fact is whether defendants were actuated by an intent to defraud when using the mails."

Harrison vs. U. S., 200 Fed. 662.

"The solution of that question (intent to defraud) was not to be found in retrospection; most men are wise after the fact. * * *

"A man may be visionary in his plans and believe that they will succeed, and yet, in spite of their ultimate failure be incapable of committing conscious fraud. Human credulity may include among its victims even the supposed impostor. If the men accused in the instant case really entertained the conviction throughout that the oil properties and the stock in dispute possessed merits corresponding with their representations, they did not commit the offense charged."

Sandals vs. U. S., 213 Fed. 575.
Citing *Durland vs. U. S.,* 161 U. S. 306.

In the Durland case it is said:

"If the testimony had shown that this company, and the defendant, as its president had entered in good faith upon that business, believing that out of the money received they could by investment, or otherwise, make enough to justify the promised returns, no conviction could be sustained no matter how visionary might be the scheme."

See also

Rudd vs. U. S., 173 U. S. 912.

ASSIGNMENT X.

Upon pages 334-5-6-7 and 8 appear the court's instructions defining the crime. This, or these instructions were prejudicial to the defendants for the reason that on page 335 in the definition of false pretenses is made to include the false representations. The court was of the view that the indictment charged the defendants with having made false representations. There is not an allegation in the indictment that defendants used either false pretenses or representations, but in all of the different statements in the instrument it is alleged that they had devised a scheme by which they were to make use of them not that they did. We quote the language used all the way through:

"And it was further a part of said scheme that said defendants in the false and fraudulent manner aforesaid *would hold forth, represent, and pretend* to divers persons *to be deceived and defrauded* thereby."

Again all of the evidence of any representations made by the defendants was based upon their belief that coal existed on all of the claims. It was not shown that any of the statements made in the letters set forth in the indictment were false. The defendants were not being tried for a fraud but for using the mails in aid of a fraudulent scheme.

ASSIGNMENT XI. AND XII.

The court beginning on page 339 defined a conspiracy and "aiding and abetting" to the jury. The instructions are erroneous for the indictment does not charge a conspiracy and the evidence does not establish one. There was no charge of "aiding and abetting" in the indictment and the evidence was silent upon the subject. It gave the jury a chance to speculate as to whether there was not something in the case other than a conspiracy upon which they could hang a verdict of guilty. Aiding and abetting comes under the rule of accessory, and an indictment must charge which one is the accessory and make a direct allegation.

State vs. Gifford, 19 W. 464.
State vs. Beebe, 66 W. 463.

The instruction also advises the jury that it was not necessary for two parties "to come together to concert the means, or to give effect to the design, nor is it necessary for the conspiracy to originate with the persons charged." As a general definition this may be correct. But the defendants are jointly

indicted and of all the other parties connected with the transaction defendants are the only ones suspected. The statute provides a scheme must be devised. The indictment alleges one was, or intended to be. We fail to see how a court may properly tell a jury that a thing the law requires must not exist. A charge of devising would have been sufficient as against one, but not as to two. They both could not have been guilty unless they devisedthe scheme before they attempted to carry it out. The charge further tells the jury that conspiracies are never proven by direct evidence, thus leaving the jury to infer that all that was necessary was to have some one indicted and then produce a large amount of voluminous evidence without any evidence of a conspiracy and that was sufficient to convict. This is making it too easy for the Government and too hard for the defendants.

The instruction upon the question of establishing a conspiracy did not go far enough. While it is true that direct evidence is not always available. "As has often been remarked, it is not necessary that direct evidence of a formal agreement should be given in such cases. If the evidence of the separate details of the transaction as it was carried out indicates with the requisite certainty the existence of a preconcerted plan and purpose this is sufficient * * *."

Reilly vs. U. S., 106 Fed. 896-905.

ASSIGNMENT XIII.

These requested instructions asked the court to direct the jury to acquit the defendants on each count and will be considered under the general head of insufficiency of the evidence.

ASSIGNMENT XIV.

This involved defendants' request No. 10.

It requested the court to instruct the jury that as to whether there were commercial deposits of coal under the Michel and Empire claims depended upon the opinion of coal experts and a criminal intent could not be established by the testimony of an expert, neither could the guilt of defendants.

The basis of the indictment is that these two claims are valueless as coal claims. Thomas, the engineer and expert for the plaintiff, so swore and gave the reasons upon which his opinion was based (p. 141 et. seq). On page 143 witness testified that there was coal underlying all of the Crown land, about 1200 acres.

Mr. Gamble, beginning at page 289, states there were large deposits of coal underlying the Crown property and in his opinion the same veins extended into the Empire and that the veins from the McInnis and Crows Nest Pass Coal Company extended under the Michel. It will be observed from this witness's testimony that this entire country is honeycombed with coal mines and workings and nothing but a

miracle could prevent their extending into these two properties.

Elmer Bell, who was called by defendants (p. 294) stated he had been on the property from July, 1910, to January, 1912, as superintendent on the Empire. Was sent there by stockholders with whom he was acquainted. That he examined the formation thoroughly and "came to the conclusion when I first looked over the property, the Empire was just as good as the Crown. That was my first conclusion and I have not changed it. I had rather have the Empire after what I saw of it than to have the Crown. The tunnel was in 447 feet, but had not reached the point where they expected to find coal.

Baptist Lameraux wrote from the Michel properties where he was prospecting. (Defendants' Exhibit 81):

"In looking over timber this winter I found the vein of coal I was looking for last fall on your claim and I can show it to you at any time."

Both of defendants testified that in addition to the foregoing they were advised by the company engineer, Mr. Hower, a man of large experience that large deposits of coal underlay both the Michel and Empire.

The defendants must have devised a scheme to defraud. They must also have entertained the intent to defraud. It is impossible for the specific intent to have existed if they were of the opinion

that these two claims contained valuable deposits of coal. The charge is they were worthless and the stock of the Crown was manipulated to sell the worthless stock.

ASSIGNMENT XV.

The request would have told the jury that unless they found the Michel and Empire claims worthless they must acquit the defendants. This involves a reference to the indictment.

All of the allegations of the various counts of the indictment refer to the corporations which were to be formed as a part of the said scheme and which were to be managed by the defendants. Then on page 5 they allege that they were to procure certain alleged coal claims, having little or no value. After stating how defendants were going to organize the various companies and get control thereof by stock ownership, and otherwise (p. 8); that they would by means of reports, letters, etc. * * * represent, state and set forth that the stock of the said various companies so organized and controlled as aforesaid was of great value (9) and would become of still greater value; and that the properties owned by said various copmnaies were of great value, etc. In various charges relative to selling treasury stock, or personal stock as treasury, it is alleged (p. 12) that "said defendants so having obtained large amounts of stock having no commercial or marketable value, etc."

It will be seen therefore that all of the various charges are based upon the defendants' manipulation of the various corporations to sell a worthless stock, and a worthless stock throughout is charged to be one representing a property which had not any commercial deposits of coal. There is not any way this indictment can be read or construed without discovering the entire basis of the fraud is the absence of coal on the Michel and Empire. The court therefore should have given this instruction.

ASSIGNMENT XVI.

There was not any evidence that either of the defendants wrote or posted the letters set out in the first and second counts of the indictment and the jury should have been so instructed (Request No. 13, p. 347).

There was not any evidence construing the letters or attempt made to show that they contained any veiled meaning. They in no wise could have aided or attempted to aid any scheme because there was no proof of any scheme and a reading of the letters cannot be construed as in any wise aiding in any attempt or scheme to defraud. The fact that they are or purport to be, signed by defendants is the only circumstance which would render them admissible. The request should have been given (No. 15, p. 348).

ASSIGNMENTS XVII. AND XVIII.

These assignments involve the defendant's requested instructions Nos. 15, 16, 17, 18, 19, and ———.

They relate to the evidence which the court permitted the Government to introduce and the bearing of such evidence upon the letters set out in the first and second counts of the indictment and which letters the indictment alleges were deposited in United States mail for the purpose of executing the alleged fraud. The statute upon which this prosecution rests, so far as material to this inquiry is as follows:

> "Whoever, having devised or intending to devise any scheme or artifice to defraud * * * *shall for the purpose of executing such scheme or artifice, or attempting so to do,* place, or cause to be placed, any letter * * * in any postoffice or station thereof * * * shall be fined not more than one thousand dollars or imprisonment not more than five years, or both."

There are two elements in the offense: First the scheme or artifice to defraud. Second, for the purpose of executing such scheme or artifice using the United States mails.

Assuming at this time for the sake of argument that the first element has been established by the Government, the question then is, What is the situation with reference to the second element?

We are not concerned with the question of whether the plaintiff in error was committing, or intending to commit, a fraud, provided the United States mail was not used in the mailing of the letter to John Niederer, set out in the first count, and the letter to Walter J. Woods, set out in the second count, "for the purpose of executing such scheme or artifice, or attempting so to do."

If we are correct in our contention that these letters set out in the first and second counts were not mailed for the purpose of executing such alleged scheme or artifice, then any evidence received for the purpose of showing fraudulent practices would be immaterial so far as establishing the commission of any crime under the statute in question.

This is not a prosecution for fraud and the Government is not concerned with reference to whether a fraud has or has not been committed, unless there has been misuse of the United States mails.

Each and all of the instructions requested by plaintiff in error above mentioned were refused by the trial court and no instructions were given dealing with the same subject. Request No. 16 would have advised the jury that this not being a prosecution for fraud it would be immaterial whether they had devised or intended to devise, any scheme or artifice to defraud, provided the letter set out in counts one and two were not for the purpose of executing such scheme or artifice. We fail to see how there can be

any escape from the conclusion that these requested instructions correctly stated the law and that the jury should have been so advised. Without such instruction there was nothing to prevent a verdict of guilty being returned, independent of any misuse of the mails.

Instructions 15 and 18 deal with the construction to be given the letter written John Niederer, and on which the first count rests. There was no attempt on the part of the Government to show that the language used in this letter was intended to convey any meaning except the natural one from the words used. There is no attempt made here to sell the personal stock of either of the plaintiffs in error, or the personal stock of International Development Company, and in fact the stock which Niederer received was treasury stock and the proceeds went into the treasury (page—). Nor was there any attempt to sell Railway stock. This being the situation, requests Nos. 15 and 18 should have been given. The principal part of the Government's evidence for the purpose of establishing a scheme or artifice to defraud was directed to attempting to show that the plaintiffs in error had sold stock, representing it to be treasury stock, when in fact it was personal stock and they had appropriated the proceeds, and to further show that they had sold Railway stock, representing it to be treasury stock, and that the proceeds were to be used in the construction of a railroad, when in fact it was their personal

stock. Should it be assumed that in these respects plaintiffs in error had overreached certain purchasers of stock, of what materiality is that as bearing upon the question of whether the plaintiffs in error in mailing the letter to Niederer were misusing the mails? If they had been guilty in the past of fraudulent practices the statute in question does not prohibit them from later using the mails lawfully. The question of previous fraudulent practices could not be an element in convicting them of a fraudulent subsequent use of the mails when such use of the mails was not for the purpose of executing such fraudulent designs. Assuming at this time that evidence relating to sales of personal stock, representing it to be treasury stock, was admissible, yet plaintiffs in error were entitled to a plain and specific instruction that such evidence could not be considered for the purpose of determining the guilt or innocence of the defendant in using the mails, where such use was not for the purpose of executing such alleged fraudulent designs.

Request No. 15 simply instructs the jury that they can give the letter written to John Niederer no meaning other than it bears upon its face, and request No. 18 should likewise have been given, instructing the jury that for the purpose of determining the guilt or innocence of plaintiffs in error said letter was not mailed for any purpose connected with the sale of plaintiff in error's own stock. Likewise, request No. 17 should have been given

and the jury told that if they found said letter related only to a sale of treasury stock, then in determining whether said letter was deposited in the mails for the purpose of executing a fraud, that the jury should disregard all evidence as to previous sales made of personal stock, representing it to be treasury stock, and all evidence relating to any misrepresentation in the sale of Railway stock.

Requested instructions 19, —, and — should have been given for the same reasons urged above as to requested instructions 15, 17 and 18. In fact, if possible, the reason for giving these requested instructions was greater. There was no connection whatever between this letter written to Walter J. Woods, set out in the second count, and any alleged fraudulent practices. It could not in the slightest be considered as having been mailed "for the purpose of executing" any scheme or artifice whatever. Certainly it was not for the purpose of executing any scheme or artifice to sell any stock to obtain any money from any person, and in particular it was not for the purpose of selling any of their own stock, representing it as treasury stock, or of selling any Railroad stock. If the action of the court in submitting the case to the jury as it was submitted can be sustained, then all that is necessary in order to sustain a conviction under this statute is to procure evidence that the accused party has committed a fraud and that he has deposited a letter in the United States mail. The requirement of the

statute that the letter must be deposited for the purpose of executing such fraud is a dead letter.

The argument made under these assignments here considered bears on many other of the assignments above discussed, particularly as to the overruling of the demurrer to the second count and the acceptance of much of the evidence.

> "* * * But the gist of the offense consists in the use of the mail. The *corpus delicti* was the mailing of the letter in the execution of the unlawful scheme. * * *"
>
> *U. S. vs. Jones,* 10 Fed. 469, 470.
>
> This interpretation of the law fails to distinguish the fraud from the use of the postoffice to effectuate it, with which the Federal law is alone concerned."
>
> *U. S. vs. Clark,* 125 Fed. 92, 94.
>
> "The second and fourth counts, however are bad. In the second it is not charged that the letter there said to have been deposited in the postoffice was so deposited for the purpose of carrying out or executing the fraudulent scheme which the defendants are alleged to have devised. This is a material part of the offense and cannot be omitted. It is the use of the mails as a means of accomplishing the fraud that is the gravamen of the charge, and we cannot supply it by intendment."
>
> *U. S. vs. Clark,* 125 Fed. 92, 93.

While in the indictment it is alleged that these letters were mailed for the purpose of executing the alleged fraud, yet the allegation cannot take the place of proof. The *allegata* and *probata* must conform. If there is any part of the allegation that

is not sustained by the proof the court should limit the allegations which go to the jury to those which are sustained by proof. In other words, the allegation that the letters were deposited in the mail for the purpose of executing the scheme or artifice to defraud by sale of their individual stock, representing it to be treasury stock, selling their individual Railway stock under representation that the money was to be used in constructing a railroad, should have been withdrawn from the jury, where the evidence disclosed that the letters were not written for any purpose connected with the execution of a sale of their individual stock, representing it to be treasury, or a sale of Railroad stock, representing that the proceeds were to be used for the construction of a railroad.

> "In my opinion the gist of the offense under the statute is the use of the mails necessarily intended as a material part of the scheme to defraud. Do the letters set out in the indictment, or any of them, show that they were in any way necessary or intended by the parties as a part necessary to carry out the fraudulent scheme contemplated by them? A mere glance at the contents of the letters, which have been hereinbefore fully set out, shows that they were no part of the fraudulent scheme. They were not, as was the case in Weeber v. United States, supra, sent through the mails in order to be used in carrying out the fraudulent scheme, nor were they intended to be shown to the intended victims for that purpose. They were simply intended to keep the intended victims themselves informed as to the acts and progress

made by the different members to the conspiracy. This is not sufficient to bring the acts within the meaning of the statute. * * * The letters set out in the indictment merely show that the defendants used the mails for the purpose of concocting schemes to defraud, but not the purpose of carrying them into effect, nor were they written to be used as a part of the fraudulent scheme. That Congress has the constitutional power to prohibit the use of the mails for such criminal purposes cannot be doubted, but, unfortunately, it has so far failed to exercise it, and until it does, the courts are powerless to interfere."

Knudsen vs. Benn, 123 Fed. 634, 636.

"Another observation to be made concerning the indictment is this: That while the fraudulent scheme, as described, was one whereby the mails were to be employed to induce persons to come to Webb City, to be afterwards defrauded, yet the letter which was deposited in the mails by Gillett, on which the third count is founded, does not seem to have been written to accomplish any such purpose, and for that reason it can hardly be said to have been deposited in the mail in execution of such a scheme as the indictment describes. It was written, as it seems, long after Davis had been induced to go to Webb City and after he had wagered his money and sustained all the loss that he could possibly sustain by reason of the alleged fraudulent scheme."

Stewart vs. U. S., 119 Fed. 89, 95-96.

"We do not wish to be understood as intimating that in order to constitute the offense it must be shown that the letters so mailed were of a nature calculated to be effective in carrying out the fraudulent scheme. It is enough if, having devised a scheme to defraud, the defendant, with a view of executing it,

deposits in the postoffice letters which he thinks may assist in acrrying it into effect, although in the judgment of the jury they may be absolutely ineffective therefor."

Durland vs. U. S., 161 U. S. 306, 315; 40 L. Ed. 709, 712.

ASSIGNMENT XIX.

Request 20, p. 349, should have been given and the jury should not have been permitted to speculate on all of the ramifications of the case, but confined by proper instruction to the allegations of the indictment.

Request 23, p. 350, should have been given for it would have advised the jury that if no misrepresentations were made by defendants as to the presence of coal on the Empire and Michel, the defendants could not be found guilty. As we have heretofore stated it was upon this theory the prosecution was based. The jury should have been permitted to pass upon the question as to whether any such misrepresentations were made, and told if none were to acquit. The evidence is overwhelming that the defendants always insisted on prospective purchasers going up and looking at the properties. This is not denied. There is some little evidence that defendants said there were veins of coal on these properties and that some samples had been taken therefrom. This they deny.

All this request asked was that the jury be permitted to pass upon this question. Nowhere in

the charge of the court was the question placed before the jury. The request did not state it as a finality, but only that the jury be permitted to pass upon it. If no such misrepresentations were made the defendants could not have been found guilty.

ARGUMENT.

The facts in the case have been pretty fully covered in the argument under the different Assignments.

In conclusion we desire to call the Court's attention to the facts which, in our opinion, would warrant this court in holding, as a matter of law, that the Government had not made a case against the defendant and that the defendant's motion made at the close of the evidence should have been granted. We will not beg the question, and will not contend that witnesses did not swear to facts which, if believed by a jury, would establish a civil liability for damages. We must take it from the rulings of the court that the Government is proceeding upon the theory of a conspiracy. The conspiracy must be established before any of the overt acts showing intent are admissible. Each overt act is a separate offense and they are admissible only to show the intent. In this case we have the court admitting the acts to show the intent prior to the time it is

claimed any conspiracy was formed. Now eliminate from the case the acts ordinarily incident to the promotion of these corporations and what have we? Merely the overt acts, or acts which it is claimed go to the question of intent. Go to the alleged indictment and you find it was a part of the scheme to defraud. Look at the evidence and we find that they were admitted for the purpose of showing intent. There is then no proof of the original scheme, combination or conspiracy. If there is not defendants are entitled to acquittal.

There are only two facts in the record which at all reflect upon the integrity of defendants, viz: The charge that with the sale of stock $100.00 worth of Railroad stock was thrown in which was to be used in the securing of a right of way and construction of a road. The other, the charge that personal stock was sold under the representation that it was treasury and the money was to be used for development. Both of defendants denied these charges, but conceding they were true: Is there any proof that at the time the first corporation was organized that these defendants intended to incorporate a railway company, or try to construct a railway? Of course there isn't. Is there any proof that at the time any of the corporations were organized that they intended forming other corporations? There is not. We are then left to one of two conclusions. Either that the scheme is established by acts which are admissible only for the purpose of proving in-

tent, or that total failure of any proof of a scheme establishes it.

If it is true they sold personal stock saying it was treasury they might be liable to the corporation, or to the party to whom it was sold providing they could show any damages. On this question, we believe, the burden of proof was with the defendants. A great many of the witnesses for the Government signed receipts, p. 302, Defendants' Exhibits 187, 188 and 193, p. 427, acknowledging they were receiving personal stock.

As to the alleged sale of Empire stock and giving $100.00 worth of railway stock with every $500.00 worth, it is scarcely worthy of notice for there were only three or four of such transactions (p. 279). It is impossible this could have been a part of the original scheme and if not defendants are entitled to an acquittal. Defendants must be convicted upon each of the schemes, in other words, if they devised it, it must be established as charged.

From the standpoint of the "rule of reason" is there even a probability that these defendants had any intent to defraud? They took all means possible to insure the location of good claims. Belden was on the claims for nearly a year at a stretch. Good and capable engineers were employed. The Crown is confessedly good ground. The defendants maintained the offices and worked without a salary, except one year.

When it came to the question of raising the money for the railroad a man was sent to Paris to raise the money. The offer of the foreign financiers was turned down, for at the Payette meeting the stockholders and directors thought it could be done better at home by raising the money among the farmers (p. 275)' and new estimates were secured on construction of the road. An attempt was made to take notes from farmers and use them, but it was not successful. Selling bonds was resorted to, but the slump in the financial market rendered them unsalable. Defendants traded their own stock for equities in farms and town property, and the amount they received or realized from cash sales would not much more than pay agents' commissions, stock sales and office expenses. The lands or equities received in trades were a liability rather than an asset and were all lost (p. 303).

If ever an effort was made to finance a corporation, it was this one. Instead of going abroad and paying a large commission they endeavored to raise the money among their own people, farmers and men of small means. They did not succeed, chiefly on account of financial conditions. Had they been able to float the bonds, the road would have been built, tunnels run and coal shipped. As it did not, defendants fell prey to the Post Office Inspectors. (Defendants' Exhibit 184, p. 426.)

Take the excerpts introduced from defendants' correspondence, beginning about Defendants' Exhibit

151, written away back in 1909; the list of officers and directors, and the whole situation bears upon its face the stamp of an earnest desire to make a success of this enterprise. If it were merely a scheme the defendants would not have put forth the effort they did to make it a success. Instead of raising the sums of money they did for the companies they would have been raising more for themselves. Not only do these communications evince an earnest desire to help the stockholders' but the action of the defendants in permitting the witness House to have access to their entire office for nine months shows they had nothing to conceal (p. 166).

If this enterprise had succeeded the defendants would have been heralded, wined and dined by the stockholders, but as it was retarded by financial conditions and departmental investigations, they are condemned.

It is evident there were times when the eastern interests tried to wrest control from the west and diffrent sorts of manipulations were resorted to to keep the control in the west, but that was not a part of, or the forming of any scheme.

Here was a case tried before a jury of farmers against two men who had attempted to finance a great operating corporation with the farmers' aid. The farmers had lost their money, and with them two or three poor women. Those who lost poured their woes into the ears of a sympathetic jury. Even

then the verdict could not have reflected the opinions of the jury for in each case they recommended leniency.

We submit the case should not only be reversed, but dismissed as to the plaintiff in error, Belden.

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